COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2337-CR **Cir. Ct. No. 2012CF1311**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LATRAE A. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: J. D. WATTS, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. LaTrae A. Williams appeals a judgment convicting him of one count of possession of cocaine with intent to deliver, as a second or subsequent offense, and one count of being a felon in possession of a firearm. He also appeals the circuit court's order denying his postconviction motion. He

argues that he received ineffective assistance of trial counsel because his lawyer did not move to dismiss on the grounds that his right to a speedy trial had been violated. We affirm.

¶2 As a preliminary matter, we address the State's argument that Williams waived his right to argue that he received ineffective assistance of counsel by entering a guilty plea. The State cites the well-established guilty plea waiver rule, which provides that a guilty or no-contest plea waives all nonjurisdictional defects and defenses, including claimed constitutional violations. *See* ***State v. Oakley***, 2001 WI 103, ¶23, 245 Wis. 2d 447, 629 N.W.2d 200. It is equally well established, however, that a plea may be withdrawn after sentencing when there is a manifest injustice. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). A manifest injustice occurs when a defendant is denied the effective assistance of counsel. ***Id.*** The State cites no support for its argument that the ineffective assistance of counsel claim must be tied to entry of the plea to overcome the guilty plea waiver rule's procedural bar. Therefore, we conclude that Williams' claim that he received ineffective assistance of counsel is not waived by his guilty plea.

¶3 Turning to the merits, a defendant claiming ineffective assistance of counsel must show both that his lawyer performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether a lawyer's actions are deficient and whether the defendant was prejudiced by his lawyer's deficient actions are questions of law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325.

¶4 A defendant is guaranteed the right to a speedy trial by the United States constitution. ***Barker v. Wingo***, 407 U.S. 514, 515 (1972). To determine

whether a defendant's right to a speedy trial has been violated, courts must use a balancing test "in which the conduct of both the prosecution and the defendant are weighed." ***Id.*** at 530. Courts should consider four primary factors: (1) whether the defendant asserted the right of a speedy trial; (2) the length of the delay; (3) the reason for the delay; and (4) the prejudice to the defendant. ***Id.*** However, "none of the four factors … [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." ***Id.*** at 533. "Rather, they are related factors that must be considered together with such other circumstances as may be relevant." ***Id.***

¶5 Williams' lawyer did not assert the right to a speedy trial until January 29, 2014, approximately one year and ten months after Williams was charged. However, we do not weigh Williams' lawyer's belated assertion of his right to a speedy trial against Williams because this omission is part and parcel of Williams' claim that his lawyer provided him with ineffective assistance.

¶6 Williams endured a two-year delay between being charged and his conviction. When the length of the delay approaches a year, it is presumptively prejudicial, triggering a closer examination of the circumstances surrounding the claim. ***State v. Urdahl***, 2005 WI App 191, ¶12, 286 Wis. 2d 476, 704 N.W.2d 324. While the delay here was significant, the delay is not by itself determinative of a violation. Wisconsin courts and the United State Supreme Court have held that there was no speedy trial violation in cases involving similar or lengthier delays. *See* ***State v. Lemay***, 155 Wis. 2d 202, 204, 455 N.W.2d 233 (1990) (no speedy trial violation for a three-year delay); ***Urdahl***, 286 Wis. 2d 476, ¶¶25, 36 (no speedy trial violation for a thirty-month delay, twenty and one-half months of which was attributable to the State); ***Barker***, 407 U.S. at 536 (no speedy trial violation for a five-year delay).

¶7 Turning to the reason for the delay, the delay here was attributable to the court's congested calendar. Hearings on Williams' motion to suppress were rescheduled repeatedly because the circuit court was unable to proceed with the hearing for one reason or another. While the delay was the result of the government's action, the delay does not weigh as heavily against the State as a delay attributable to intentional action by a prosecutor to gain prosecutorial advantage. *See* ***Urdahl***, 286 Wis. 2d 476, ¶26 (citation omitted) ("A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or over-crowded courts, though still counted, are weighted less heavily.").

¶8 As for prejudice to Williams from the delay, it "should be assessed in the light of the interests … which the speedy trial right was designed to protect." ***Barker***, 407 U.S. at 532. The right to a speedy trial was designed: (1) to prevent oppressive pretrial incarceration; (2) to minimize the anxiety and concern of the accused; and (3) to limit the possibility the defense will be impaired. ***Id.***

¶9 When Williams was charged with this crime, he was in jail serving a misdemeanor sentence. After the misdemeanor sentence was completed, he spent an additional year and nine months in jail on this charge before the circuit court decided his suppression motion, which in turn led to Williams' prompt entry of a guilty plea. While Williams suffered through pretrial incarceration and the anxiety engendered by pending charges, there is no indication that he was impaired in his ability to defend himself. As the United States Supreme Court explained in ***Barker***, the most serious concern is prejudice to the defendant's ability to present a defense "because the inability of a defendant to adequately prepare his case

skews the fairness of the entire system." ***Id.***, 407 U.S. at 532. Moreover, Williams ultimately received credit against his sentence for his pretrial incarceration so the delay did not cause him to spend additional time in prison. On the whole, the lack of prejudice to Williams weighs strongly in favor of a conclusion that his right to a speedy trial was not violated.

¶10 In sum, then, Williams endured a delay of moderate length, which was attributable to the government, although without malicious intent, and he had to live with the anxiety of pending criminal charges for a substantial period of time. However, these factors are counterbalanced—and ultimately outweighed—by the minimal prejudice Williams suffered. His ability to defend himself was not impaired. He received credit against his sentence for the time he spent incarcerated. We therefore conclude that Williams' constitutional right to a speedy trial was not violated. Williams' argument that he received ineffective assistance of counsel because his lawyer did not move to dismiss for a speedy trial violation is unavailing. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987) (counsel's failure to raise an argument that would not be successful does not constitute ineffective assistance of counsel).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.